Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1997

CHARLES GUNN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES CONSERVATION SERVICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

BACKGROUND

The "Swampbuster" provision of the Food Security Act of 1985 provides, "[n]o person shall become ineligible ... for program loans or payments ... [a]s the result of the production of an agricultural commodity on ... [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." 16 U.S.C. § 3822(b)(1)(A).

Under Section 3801(a)(6)(A), a "converted wetland" is a wetland that is "manipulated ... for the purpose or to have the effect of making the production of an agricultural commodity possible."

QUESTION

Is *Chevron* deference due an agency regulation implementing a statute where the agency regulation conflicts with the clear and unambiguous language of the statute and the regulation redefines the regulatory program, such as in this case where the agency held a person who commenced the farming of a wetland on his property for agricultural commodities in 1906 was not eligible for farm program loans and payments because the wetland had not lost *all* its wetland characteristics, and became a "converted wetland," until 1992?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Stuart, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations and that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the Court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the adoption, interpretation, and administration of laws and regulations.

There is a growing trend among federal agencies to expand their jurisdiction incrementally by adopting regulatory

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

interpretations that go beyond the plain meaning and intent of their authorizing statutes. Under the Clean Water Act, for example, the Army Corps of Engineers asserted jurisdiction over puddle-sized seasonal wetlands (as "navigable waters of the United States") long before the Act even mentioned wetlands. In this case, the United States Department of Agriculture is extending its regulatory reach to include wetlands that have been expressly exempted from certain farming limitations by the "Swampbuster" provision of the Food Security Act of 1985. Executive branch agencies must be limited to the scope of authority delegated by Congress.

PLF has participated in numerous cases involving the interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in the *Steel Company v. Citizens for a Better Environment*, U.S. Supreme Court No. 96-643 (pending); *Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Douglas County, Oregon v. Babbitt*, 116 S. Ct. 698 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

Charles Gunn owns 160 acres of land in Iowa. At one time, this acreage was wetlands and not suitable for farming. However, in 1906 the local drainage district installed a system to drain all excess water from the land. Since then, Gunn and his predecessors-in-interest have farmed the land continuously.

Additions to the drainage system within the district allowed water from neighboring farmland to drain across Gunn's land (when the system exceeded capacity) so that by 1947 parts of Gunn's land were sometimes too wet to farm but dry enough at other times to farm. The district addressed this problem in 1992 by upgrading the system to again allow complete draining of Gunn's land.

In 1985, Congress passed a provision to the Food Security Act commonly known as "Swampbuster." Pub. L. No. 99-198, §§ 1201, 1221-1223, 99 Stat. 1354, 1504-08 (codified as amended at 16 U.S.C. §§ 3801, 3821-3824). This provision was intended to protect wetlands against conversion to agricultural use but "grandfathered" use of wetlands where conversion to agricultural production *commenced* before December 23, 1985. "Swampbuster" did not make it illegal to convert wetlands to agricultural use after 1985, but it did provide that any agricultural production on a "converted wetland" would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs.

To participate in these programs, a farmer must certify his eligibility to the Soil Conservation Service (SCS), now the Natural Resources Conservation Service. SCS determines whether the land for which the farmer seeks benefits contains wetlands that have been converted for agricultural purposes. Since Gunn's land had been drained and farmed since 1906, he sought certification in 1991 and was told by SCS that approximately 20% of his land was not "converted wetlands" under the Act but so-called "farmed wetlands."[2] SCS also told Gunn he could continue to use these "farmed wetlands" but that he would lose his farm benefits if he improved the drainage system. In consequence of the 1992 upgrade to the drainage

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[2] "Farmed wetlands" is a wetland classification that does not appear in "Swampbuster" but is used by SCS to refer to wetlands that are sometimes dry enough to farm.

system by the local drainage district, SCS classified 28.2 acres of Gunn's land as wetlands that had not been converted to agricultural use until 1992, after the 1985 deadline.

Gunn filed suit in district court seeking, among other things, declaratory judgment that he was entitled to farm this land without losing benefits. In reliance on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, the district court ruled that the classification of Gunn's land as post-1985 "converted wetlands" was reasonable and denied Gunn's request for declaration. Gunn appealed to the Eighth Circuit Court of Appeals claiming the government's interpretation of the terms "commenced" and "converted wetland" are inconsistent with the "Swampbuster" statute. Although the circuit court acknowledged that the words of the statute can bear the meaning Gunn contends, the court held the SCS interpretations were "sufficiently plausible to meet the *Chevron* test." *Gunn v. U.S. Department of Agriculture*, 118 F.3d 1233, 1238 (8th Cir. 1997).

SUMMARY OF ARGUMENT

Chevron deference does not lie where the intent of Congress is clear from the words of the statute, but only where a statute is silent or ambiguous. With respect to the definition of "converted wetland" under "Swampbuster," Congress was neither silent nor ambiguous but precisely defined the term. A wetland is converted when it is "manipulated ... for the purpose or to have the effect of making the production of an agricultural commodity possible." Gunn's land was manipulated by draining in 1906 and has been farmed continuously ever since.

Under "Swampbuster," farming "converted wetland" is exempted from the Act's restrictions if the conversion was commenced before December 23, 1985. Gunn's land met this statutory definition. But, in contravention of the Act, the agency "rewrote" the statutory scheme to add that the manipulation must have been so complete as to eliminate all wetland characteristics of the land.

Federal agencies should not be allowed to rewrite their legislative mandate. The agency's interpretation conflicts with the plain language of the statute and the legislative history and, therefore, should not be upheld. Approximately 75% of wetlands remaining in the lower 48 states are found on private land, primarily farmland. By one estimate, up to 60 million acres may be characterized as "converted wetland." Against this backdrop, and over concerns for the plight of farmers, Congress passed the Food Security Act of 1985 to provide "an economic climate in which efficient American family farmers can survive." The balance Congress sought between wetland protection and protection of small family farmers took the form of an exception to "Swampbuster." Congress expressly "grandfathered" wetland areas farmed prior to the 1985 deadline. The executive agency has no authority to reconsider this legislative policy determination.

Additionally, in analogous situations, other circuit courts of appeals have applied the *Chevron* test differently from the Eighth Circuit in this case. This disparate treatment under the law has significant ramifications for the economic competitiveness of our Nation's family farmers. This Court should review the Eighth Circuit judgment, in light of Fifth and District of Columbia Circuit decisions, to establish a consistent application of *Chevron*.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF LAW RELATING TO THE GOVERNMENT'S EXPANSIVE INTERPRETATION OF THE "SWAMPBUSTER" PROVISION OF THE FOOD SECURITY ACT OF 1985

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, this Court set forth a standard for court review of an agency's construction of a statute it administers. First, is the question whether Congress has directly spoken to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. And second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The issue in this case is whether Gunn commenced the conversion of wetlands on his property before December 23, 1985. Congress spoke precisely to that question in "Swampbuster" and stated it intended to "grandfather" farming operations in wetlands, like Gunn's, that had begun before the statutory deadline. 16 U.S.C. § 3822(b)(1)(A). But the court below allowed the government to sidestep the intent of Congress, and the judicial standard this Court established in *Chevron*, by endorsing the agency's redefinition of the statutory scheme for "converted wetlands." The Eighth Circuit judgment guts the protections "Swampbuster" provides our Nation's farmers—who are already pressed by mounting environmental regulatory demands—and undermines national agricultural production. Of the roughly 100 million acres of wetlands remaining in the lower 48 states, about 75% of these areas are located on private, primarily agricultural land. Michael S.

Naggy, *The Definition of "Wetlands" Under Section 404 of the Clean Water Act: Past, Present, and Future*, 3 U. Balt. J. Envtl. L. 92, 101 (1993). By one estimate, up to 60 million acres may be characterized as "converted wetland." *See* Houston Chron., Sept. 30, 1990, at 2A.

A. Congress Has Directly Spoken to the Precise Issue in This Case and the Intent of Congress Is Clear

In *Chevron*, this Court looked both to the statutory language and the legislative history to determine whether Congress addressed the issue before the Court. The statutory language in this case is clear and unambiguous.

Under Section 3822(b)(1)(A) of Title 16, "[n]o person shall become ineligible ... for program loans or payments ... [a]s the result of the production of an agricultural commodity on ... [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." Section 3801(a)(6)(A) provides:

> The term "converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if:
>
> (i) such production would not have been possible but for such action; and
>
> (ii) before such action—
>
> (I) such land was wetland; and
>
> (II) such land was neither highly erodible land nor highly erodible cropland.

In 1906, Gunn's land was drained or otherwise manipulated both for the purpose and with the effect of making the

production of agricultural commodities possible. This production has continued ever since. This is a matter of record which the lower court does not dispute. The Eighth Circuit even begrudgingly admits that a plain reading of the statutory language supports Gunn's claim that his property is "converted wetland" under the Act. *Gunn*, 118 F.3d at 1238. However, in putative reliance on *Chevron*, the court upholds the agency's view that "[i]f significant wetland characteristics remain, the land remains wetland and cannot be converted wetland." But this view is not supported by the statutory language. Indeed, it conflicts with the statutory language.

The definition of "converted wetland" is expressly conditioned on the manipulation of the wetland for agricultural production. It does not require or imply that the manipulation must be so complete that all wetland characteristics disappear.

To the contrary, the definition specifically includes "any activity that results in impairing or reducing the flow, circulation, or reach of water" on the wetland. This language contemplates a partial conversion of wetland features, not a total elimination of wetland characteristics. This conclusion is made clearer by two other references.

First, the Act only requires that the conversion of the wetland "was *commenced* before December 23, 1985." 16 U.S.C. § 3822(b)(1)(A) (emphasis added). The term "commenced" is not ambiguous. It is commonly understood to mean begin or start. It is not a term in need of definition and Congress offered none. And second, the legislative history demonstrates congressional intent to "grandfather" prior farmed wetland:

> Mr. Daschle offered an amendment, to deny Federal farm program benefits to persons planting agricultural commodities on converted wetlands for harvest .... Mr. Daschle noted that while the sodbuster provisions [prohibiting farming on highly erodible

> lands] would be retroactive, the swampbuster amendment would only be concerned with conversion of wetlands as of the date of enactment ....
>
> ....
>
> ... Mr. Daschle and Mr. Lewis discussed the question of cropland that has been flooded and later reclaimed. Mr. Daschle stressed that the amendment would not affect the use of this land because *if production was underway at any time in the past, the land would be grandfathered.*

H.R. Rep. No. 99-271, pt. 1, at 416, 419, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1520-23 (emphasis added).

It should be clear that Congress spoke to the precise issue of when "Swampbuster" applies and that Congress intended if agricultural "production was underway at any time in the past [before December 23, 1985], the land would be grandfathered." Gunn's land was drained in 1906 and has been farmed ever since. As the Eighth Circuit correctly noted, but misunderstood: "Under the statute, conversion occurs when wetland is manipulated with a certain effect. The [agency] regulation simply underscores that it is the initial manipulation, not some subsequent applications of it, that is to be considered for this purpose." *Gunn*, 118 F.3d at 1239 n.3. Under this standard, Gunn's land qualifies as "converted wetland." The agency's contrary construction is due no deference under *Chevron*. Unlike in the Clean Air Act under review by this Court in *Chevron*, Congress left no gap in "Swampbuster" for the agency to fill. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974). "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 855.

B. The Agency Did Not Interpret an Ambiguous Statute; Rather, It "Rewrote" the Statutory Scheme

The Eighth Circuit went awry in this case when it gave *Chevron* deference to the agency's view that if the drainage or other manipulation has been sufficient to make crops producible, as is the case here, but the land retains wetland characteristics, the land is best described as "farmed wetland," as opposed to "converted wetland." *Gunn*, 118 F.3d at 1238. According to the agency, "farmed wetlands" can be farmed without loss of benefits only so long as the previously accomplished drainage or manipulation is not significantly improved. *Id.* But this is not a simple interpretation of the statutory language, it is an excursion and incursion into the legislative realm that amounts to nothing less than a redefinition of the statutory scheme. The agency simply did not like the all-or-nothing language of "Swampbuster," which "grandfathers" all wetlands put into agricultural production before December 23, 1985, so the agency "rewrote" the statute to further restrict land use.

"Farmed wetlands" is a term that does not appear in the statute. Rather, it is a term adopted by the agency's regulations. *Id.* Notwithstanding the lack of statutory authority for the agency's reclassification of wetlands under "Swampbuster," the Eighth Circuit erroneously concluded that this new wetland classification somehow "accords with the general purpose of the statute—to preserve those wetland characteristics still in existence in 1985." *Id.* But this misses the point. *Chevron* does not give license to the agency to set aside a specific statutory scheme defined by Congress in favor of the agency's view of the statutory purpose.

Moreover, the court cites no authority for its limited characterization of the purpose of the statute. Indeed, the statute expressly excepts wetlands put into agricultural production before enactment of the statute, demonstrating a clear economic purpose to the "grandfather" clause of the "Swampbuster" provision. In addition, the Food Security Act

of 1985 derived from a large and complex omnibus bill that was based on a congressional desire to bolster a failing agricultural economy:

> The purpose of this bill is simple. It is to provide, as far as it can be done in legislation of this kind, the basis for an economic climate in which efficient American family farmers can survive the grim squeeze that has already driven too many of them to or close to the brink of ruin.

H.R. Rep. No. 99-271, pt. 1, at 8, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1520-23 (emphasis added).

The drafters felt the need for this bill was obvious to all who had followed recent developments. *Id.* They noted that even if Congress were willing to let important segments of agriculture collapse, Congress could not afford to do so because of the dangers this would pose to the entire national economy. *Id.*

It was clear to these drafters that what Congress did about new farm policy must be based on the understanding that agriculture is our Nation's largest and most basic industry. *Id.* at 1111-12. They believed America's farmers have given our people the world's best diet at costs which—in comparison to the average consumer's earnings—really constitute a farmer subsidy to the general public. *Id.* at 1112. They also believed that one of the chief reasons this country has been able to grow and make progress in many areas has been the increasing efficiency of its farmers and the other segments of agriculture. *Id.* "When agriculture is depressed, the farmer and his family suffer—but they do not suffer alone." *Id.* They noted with great concern the distress in the agricultural supply industries, and in businesses on hundreds of main streets around the Nation. *Id.* And in the long run, the drafters conclude, a

depressed and demoralized agriculture would be very bad economic news for the entire Nation. *Id.*

This legislative history demonstrates that the primary purpose of the Food Security Act of 1985 was, as the name of the Act implies, to protect the Nation's efficient supply of food by providing security to our family farmers. Congress chose to balance this effort with a conservation ethic that protects wetlands, but not at the expense of prior farming practices. Congress made a policy decision to "grandfather" prior "converted wetlands" and established a clear and unambiguous definition of this term—a definition that would be easy to meet and which would allow average farming families to anticipate the effects of their farming practices on farm program benefits. But the agency has supplanted Congress' public policy decision. Rather than accord with the general purpose of the statute, the agency's "farmed wetland" classification undermines that purpose.

When federal agencies can "rewrite" their legislative mandate and change the expectations of the regulated farming community at will, this causes unnecessary distrust of the government and demoralizes the industry. We all lose when that happens. This Court should not allow the government to rely on *Chevron* to circumvent the will of Congress to protect and promote efficient farm production for the agency's perceived "larger goal" of wetland protection.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RECONCILE INCONSISTENT APPLICATIONS OF THE *CHEVRON* TEST AMONG THE CIRCUIT COURTS OF APPEALS

In analogous circumstances, other courts of appeals have applied *Chevron* differently from the Eighth Circuit in this case. In *National Mining Association v. Department of Interior*, 105 F.3d 691 (D.C. Cir. 1997), the District of Columbia Circuit

had to consider regulatory implementation of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201, *et seq*.

In 1977, Congress enacted SMCRA "to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *National Mining Association*, 105 F.3d at 693. The Office of Surface Mining Reclamation and Enforcement (OSM) administers and enforces SMCRA. Under SMCRA, no person may engage in surface coal mining without a permit. At issue was OSM's interpretation of the Act's ownership and control provision.

Section 510(c) of SMCRA is as clear as "Swampbuster" and states that when "any surface coal mining operation owned or controlled by the applicant" is currently in violation of SMCRA, the permit shall not be issued. However, just as in *Gunn*--the present case, the agency expanded the statutory limitation by adding a new regulatory category. OSM adopted a rule that the permit shall not issue if an operation owned or controlled "by either the applicant or *by any person who owns and controls the applicant*" is currently in violation of SMCRA. *National Mining Association*, 105 F.3d at 694. This broadening of the Act to cover the owners of applicants in addition to the applicants themselves is no more expansive than the agency's rule in *Gunn*. In *Gunn*, the agency adopted a rule that wetlands are "converted wetlands" not when they are manipulated for agricultural production, as "Swampbuster" explicitly states, but rather when they are manipulated to eliminate permanently all wetland characteristics.

However, contrary to the deference shown the government in *Gunn*, the D.C. Circuit in *National Mining Association* applied the first step of *Chevron* to strike down this construction of the statute. The court held that the statutory language was unmistakably clear and that "OSM is attempting to use section

510(c) to regulate those not covered by that section." *Id.* at 694-95. The same could be said for the agency's attempt in *Gunn*. The agency is trying to regulate "farmed wetlands" that are not covered by the "Swampbuster" provision.

Additionally, unlike the court in *Gunn*, the D.C. Circuit was not deterred from applying *Chevron* to void the agency regulation even though the general purpose of SMCRA was to protect the environment. *Gunn*, it seems, would have fared differently in the D.C. Circuit where the court's application of *Chevron* accords more with this Court's holding in that case. But the D.C. Circuit is not the only Circuit that takes a different view of *Chevron*.

In *Hernandez v. Reno*, 91 F.3d 776 (5th Cir. 1996), the plaintiff challenged the Immigration and Naturalization Service (INS) regulations implementing the Family Unity Provision of the Immigration Act of 1990. The Family Unity Provision of the Act provides that an alien who is an eligible immigrant as of May 5, 1988, among other things, shall be granted authorization to work in the United States. However, the INS regulations require that an alien seeking Family Unity status as the spouse or child of a legalized alien must be such not only on May 5, 1988, but continuously thereafter until permanent residency is granted.

This INS interpretation of the Immigration Act is remarkably similar to the SCS interpretation of "Swampbuster." Under "Swampbuster," "[n]o person shall become ineligible ... for program loans or payments ... [a]s the result of the production of an agricultural commodity on ... [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." However, the agency interprets this provision to mean that the farmer not only must have commenced the conversion before December 23, 1985, but also must have "actively pursued" the particular conversion until the

conversion is complete, that is until the wetland no longer demonstrates any wetland characteristics. *Gunn*, 118 F.3d at 1237.

The INS interpretation in *Hernandez* was initially upheld by the district court which relied on *Chevron* and ruled that the INS regulation interpreting the Family Unity Provision requiring the alien to maintain the same relationship throughout the pendency of his petition was a permissible construction of the statute. But the Fifth Circuit overruled the district court decision:

> Chevron deference does not lie where the intent of Congress is clear from the words of the statute, but rather where a statute is "silent or ambiguous with respect to the specific issue ...." The statute requires that Hernandez be the spouse or unmarried child of a legalized alien on May 5, 1988. It requires no more. The INS regulation adding a requirement that the alien continuously maintain that same relationship is in conflict with the plain language of the statute. Our duty is to give effect to the clear, unambiguous intent of Congress. Whether Hernandez marries after May 5, 1988 is irrelevant to the inquiry under the Family Unity Provision of the Immigration Act of 1990.

Id. at 780-81.

Similarly, the Eighth Circuit in *Gunn* ruled that the agency's interpretation of the "Swampbuster" provision was "sufficiently plausible to meet the *Chevron* test." *Gunn*, 118 F.3d at 1238. However, the intent of Congress in "Swampbuster" is clear from the words of the statute. The statute is not silent or ambiguous with respect to what constitutes a "converted wetland." The statute requires that Gunn manipulate a wetland for the purpose or with the effect of

making the production of an agricultural commodity possible before December 23, 1985, which has happened on Gunn's land since 1906. The statute requires no more. The agency regulation requiring Gunn to "actively pursue" the complete conversion of his land and reclassifying his "converted wetland" as a so-called "farmed wetland" is in conflict with the plain language of the statute. The duty of the Court is to give effect to the clear, unambiguous intent of Congress. Whether Gunn manipulated his land after December 23, 1985, is irrelevant to the inquiry under the "Swampbuster" provision of the Food Security Act of 1985.

The type of disparate treatment under the law demonstrated by these cases has significant ramifications for the economic competitiveness of our Nation's family farmers. This Court should review the Eighth Circuit decision in light of *National Mining Association* and *Hernandez* to establish a consistent application of *Chevron*.

CONCLUSION

The Eighth Circuit's judgment conflicts with the plain language of the "Swampbuster" provision of the Food Security Act of 1985. It guts the public policy decision of Congress to "grandfather" prior farming of wetlands to bolster small family farms. It also distorts the intent of *Chevron*, which requires agencies to defer to the unambiguous intent of Congress as expressed in a statute. Federal agencies should not be allowed

to co-opt the legislative function by "rewriting" the statutory scheme to achieve their own ends. For these reasons, and to address conflicting applications of *Chevron* among the circuits, this Court should grant the petition for writ of certiorari.

DATED: January, 1998.

Respectfully submitted,

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